

No. 2587

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ROSE BRIGHT, et al.

Plaintiff in Error

vs.

VIRGINIA GOLD HILL WATER COMPANY
(a corporation),

Defendant in Error

BRIEF FOR PLAINTIFF IN ERROR

SWEENEY & MOREHOUSE,

Counsel and Attorneys for
Plaintiff in Error.

Filed this-----day of-----, 1915.

FRANK D. MONCKTON, Clerk.

By-----Deputy Clerk.

Filed
SEP 23 1915
F. D. Monckton

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Brief of Plaintiff in Error.

This writ is taken from a judgment sustaining a demurrer to plaintiff's third amended complaint. The questions are solely of law, based on the facts as set forth in the complaint. The demurrer is upon several grounds, but as the Court, in its opinion, passed only upon the one ground of demurrer, to wit:

"That the complaint fails to state facts sufficient to constitute a cause of action," we shall only brief that point.

The Court cites only one case presented by us, that of

Lee vs. McLeod, 12 Nev. 280

And holds that because we use the words that "the defendant diverted and stopped the said overflow of water as aforesaid" (Trans. p. 18) that this means that the defendant failed to divert enough water from Marlett lake to create an overflow and a waste which would run down to plaintiff's premises.

But the Court overlooked the distinct averment, (Trans. p. 8) "and was overflowing as heretofore, and there was plenty of water for the purposes herein stated, and no loss or reduction of the quantity of water, for the uses and purposes of said defendant and to enable it to keep its agreement." This averment shows clearly, that sufficient waters was diverted by defendant at Marlett lake, to meet every demand, and no change had taken place of any kind, that changed the original condition of affairs.

Now that an oral agreement may become the **basis** of a license, is clearly held in

Lee vs. McLeod, 12 Nev. 280.

Which we cited, for the purpose of showing that a parol contract, when executed, was not within the statute of frauds. Not that, that particular case entitled us to judgment, but that it did establish the rule, that having acted for many years under the parol agreement, and having thus acted to the expenditure of hundreds of dollars and planted a valuable crop, that such license could not be revoked, at a time, which would cause a serious loss, without being compelled to respond in damages for the loss. Such we understand to be the true rule, even under a revocable license.

Flisk, et al, vs. Hill, 42 Pac. 813

Where it is said "Such revocation, followed as it must be, with the absolute forfeiture and loss of defendant's labor and property, would shock the sense of justice of every right minded man, and would be a stain upon the administration of justice," and then this last case holds, if the improvements made under the faith of the license, cannot be removed "that the licensor shall make just compensation therefor, as the circumstances of the case may require."

Now the complaint fully shows the cost of planting the crops, that the water was running and was used as it always had been, that defendants had plenty of water, that it knew the plaintiff had planted their crops and were relying on the use of water, and without any reason, or cause, cut the water off, causing plaintiffs to lose everything. Where the water came from is a matter of no moment, because having the water, and having agreed that the water should be so used, what right had it to cut off the water? If it could not furnish the water that would, probably, be a defense on trial, but does not become a foundation for demurrer. They contracted to furnish the water. Admit such contract to be a revocable license (which we do not admit) yet it cannot revoke such license to plaintiffs' damage without compensating plaintiffs for the loss.

This is certainly the law as laid down by

Renick vs. Kern, 14 Sergeant, Etc 267.

By the Court of Pennsylvania, and while our action is at law, the rule is not changed, because we seek damages, the defendant being fully able to respond.

See the long and splendid note to *Renick vs. Kern*, 16 Am. Dec. 501.

Also see Dec. 983 Ind. 2nd Ed. *Kinney on Irrigation*, etc.

Stoner vs. Zucker, 148 Calif. 516.

Now our contention is, that if the license be revokable or irrevokable, it would be a fraud to stand by, permit and fully authorize a party to use water, and expend a large sum of money upon the faith of an oral contract, and plant crops, raise fruit trees, and then suddenly, without any reason therefor, cut off the supply of water, and cause the licensee a large damage. If such is the law, then law is made to accomplish wrong and injustice. It would certainly shock the sense of honest men to permit a man to make a contract, although it be oral, and then break such contract at pleasure, with the full knowledge that the other party to the contract would be seriously damaged, and then sit back and say, "I don't care, your contract was oral." "I don't owe you anything." Now, such cannot be the law. No doubt the license can be revoked, but we claim it cannot be revoked until such time as the natural term of its continuance for the purpose of raising this year's crop has ended. If revoked before the crop has been produced, after it has been planted, upon the faith of such license, then the licensor is bound to pay the damage, he or it has created.

Curtis vs. La Grande, 20 Ore. 34.

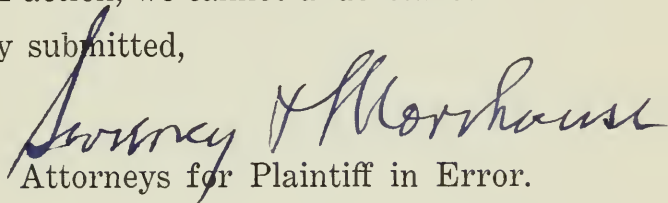
Such an action is one at law, and while the rule of evidence may be equitable, yet plaintiffs were compelled to sue at law, because

By Sec. 723 R. S. of U. S.

Suits in equity shall not be sustained in courts of the United States where plaintiffs have a plain, speedy and adequate remedy at law, and here we have a plain, speedy and adequate remedy in damages, and because the contract was oral, is only a matter of evidence, and not a **remedy** of any kind.

Wherein this complaint is defective and fails to state a **cause** of action, we cannot understand.

Respectfully submitted,


Attorneys for Plaintiff in Error.

